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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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I

THE ELEVENTH AMENDMENT PROHIBITS COMPENSATION FOR PREJUDGEMENT INTEREST.

Petitioners (hereinafter the "State") file this reply brief to address the arguments presented by both the respondents (hereinafter the "Plaintiffs") and the *amicus curiae*.

In support of their position that the Eleventh Amendment does not bar prejudgement interest or compensation for delay, plaintiffs call into question this Court's previous Eleventh Amendment decisions. While plaintiffs expressly ask the court to overrule *Hans v. Louisiana*, 134 U.S. 1 (1890) (Resp. Br. 19-21), adoption of plaintiffs' position, short of reversal, would still require the court to repudiate a long-standing line of Eleventh Amendment decisions. Plaintiffs' position would also require the court to find that a State's sovereign immunity, embodied in the Eleventh Amendment, is entitled to less deference and is more easily abrogated than the sovereign immunity available to the United States.

Plaintiffs also take the position that this Court's Eleventh Amendment decisions do not apply in analyzing the scope of a statutory enactment applicable to the States. This position, however, is inconsistent with the analysis used by this Court in *Library of Congress v. Shaw*, 478 U.S. 310 (1986). As shown below, plaintiffs' argument is legally deficient because it necessarily depends on the principle that prejudgement interest or compensation for delay is included within the terms of 42 U.S.C. § 1988.

A. Eleventh Amendment Immunity Is Equivalent to Common-Law Sovereign Immunity.

Plaintiffs' position requires this Court to find that the constitutionally-based immunity enjoyed by the states is inferior to the common-law sovereign immunity of the United States. Plaintiffs argue that there is "no reason to assume that immunity under the Eleventh Amendment is coextensive with the sovereign's common-law immunity from suit in its own courts." Resp. Br. 16. Plaintiffs' position, however, reflects a fundamental misunderstanding of the basis of the Eleventh Amendment and the importance of this principle in our constitutional jurisprudence.

The origins of the Eleventh Amendment are well known. In *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793), this Court assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. The decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

Justice Iredell's dissenting opinion in *Chisholm v. Georgia*, is generally regarded as embodying the rationale of the Eleventh Amendment. See *Hans v. Louisiana*, 134 U.S. 1, 12 (1890). This is significant because Justice Iredell traced the origin of the states' sovereign immunity to the common law as it existed in England. Thus, contrary to plaintiffs' implication (Resp. Br. 15-16), the United States' sovereign immunity and the individual state's sovereign immunity are derived from the same common-law origins.

Justice Iredell's dissenting opinion in *Chisholm v. Georgia* contains an extensive discussion of the common

law of England as the basis of the immunity possessed by the states.

> Now I presume it will not be denied, that in every State in the *Union*, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State, were those which in *England* apply to claims against the crown . . . .

2 Dall., at 437.[1] See also *id.* at 435 ("'the common law' . . . is the ground-work of the laws in every State in the *Union* . . . *as it existed in England*") (emphasis in original); *id.* ("the *United States* have no claim to any authority but such *as the States have surrendered to them*") (emphasis in original).

Admittedly, Justice Iredell's dissenting opinion is in the context of a case that did not involve a federal question. On the constitutional question, however, Justice Iredell intimated a view consistent with more recent decisions of this Court:

> So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, *under any circumstances*, a compulsive suit against the State for the recovery of money.

2 Dall., at 449 (emphasis added).

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1. Compare this passage with plaintiffs' description of the basis of the United States' sovereign immunity: "Since the King was at the apex of the federal pyramid, there was no higher court in which he could be sued." Resp. Br. 15, citing *Nevada v. Hall*, 440 U.S. 410, 415 (1979).

Thus, relying heavily on Justice Iredell's dissent, this Court's unanimous decision in *Hans v. Louisiana* firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity. The Amendment is a "specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 120 (1984) ("Pennhurst II") (emphasis in original). See also *Missouri v. Fiske*, 290 U.S. 18, 26 (1933) (Eleventh Amendment prohibits suit against state even though controversy arises under constitution or laws of United States).

While the need to vindicate federal rights is important, this Court has emphasized that "the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst II*, 465 U.S. at 105. More importantly, this Court has recently declared that "the fundamental principle enunciated in *Hans* has been among the most stable in our constitutional jurisprudence." *Welch v. Texas Department of Highways and Public Transportation*, 107 S.Ct. 2941, 2952 (1987).[2]

Therefore, there is no basis for plaintiffs' implication that Eleventh Amendment immunity is an inferior doctrine and entitled to less deference. While Congress has the authority to waive the United States' sovereign immunity and abrogate the states' Eleventh Amendment immunity, the standards established by this Court are legally indistinguishable.

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2. For this reason, plaintiffs' request that *Hans v. Louisiana* be overruled should not be considered. *Welch* notes that the "general principle of state sovereign immunity has been adhered to without exception by this Court for almost a century." *Welch*, 107 S.Ct. at 2956. To reconsider almost one hundred years of jurisprudence in the context of this case is not appropriate due to the complexity of the issue. *Welch*, 107 S.Ct. at 2958 (Scalia, J., concurring).

In *Library of Congress*, the United States' immunity with respect to interest was upheld. This Court noted that waivers of immunity must be construed "strictly in favor of the sovereign" and emphasized that a waiver requires an "*affirmative* congressional choice." 478 U.S. at 318, 319 (emphasis added).

Arguably, this Court's Eleventh Amendment decisions set forth an even more rigorous standard. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985), held "that Congress must express its intention to abrogate the Eleventh Amendment in *unmistakable* language *in the statute itself*." *Pennhurst II* emphasizes that a waiver requires "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" 465 U.S. at 99, citing *Quern v. Jordan*, 440 U.S. 332 (1979).[3]

The Eleventh Amendment is generally recognized as a constitutional limitation on the *type* of relief available against a state. See discussion in *Kentucky v. Graham*, 473 U.S. 159, 165-71 (1985). See also *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law). While there may be reasonable policy reasons for an award of prejudgement interest or compensation for delay, policy alone is insufficient to defeat the State's constitutional immunity. *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment").

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3. This Court's recent Eleventh Amendment decisions call into question the validity of the holding in *Hutto v. Finney*, 437 U.S. 678 (1978). See Pet. Br. 18 n.10. If a reconsideration of Eleventh Amendment principles is undertaken, then the State suggests that *Hutto v. Finney* is more of an aberration than *Hans v. Louisiana*.

B. Prejudgement Interest Is Not a Component of Costs.

Plaintiffs claim that this Court's Eleventh Amendment decisions have "no bearing" on the consideration of "the scope" of § 1988. Resp. Br. 6. See also Resp. Br. 11 (Eleventh Amendment decisions do not "apply in determining the *scope* of a statute") (emphasis in original). Thus, plaintiffs conclude that the "stringent standards for abrogation set forth in this Court's Eleventh Amendment decisions do not address litigation *costs*." Resp. Br. 6 (emphasis added).

Ignoring the clear holding of *Library of Congress*, plaintiffs repeatedly emphasize this point. See, e.g., Resp. Br. 10 ("The states do not enjoy any Eleventh Amendment immunity from *costs* comparable to the sovereign immunity of the federal government"); *id.* ("interest on *costs* is fairly only a part of *costs*"); *id.* at 13 ("Congress has by statute given the federal courts jurisdiction to entertain applications for *costs, including attorney's fees,* against the states") (emphasis added).

Consequently, the logical conclusion of plaintiffs' argument is that *Library of Congress* was wrongly decided. While discussed in more detail in the State's opening brief, *Library of Congress* considered the fee-shifting provision of Title VII. The statute allowed "a reasonable attorney's fee as part of the costs" and provided that the United States was liable "for costs the same as a private person." § 706(k) of Title VII, 42 U.S.C. § 2000e-5(k). *Library of Congress* held that prejudgement interest or compensation for delay was not included within the *scope* of this statute.

Specifically, this Court held that the term "reasonable attorney's fees" did not include interest as a component. 478 U.S. at 320. The court also emphasized that while the term "costs" included a reasonable attorney's fee, prejudgement interest was not a component of "costs". *Id.* at 321. In unambiguous language even plaintiffs cannot ignore, the court stated that "the term costs has never been understood to include any interest component." *Id.*

Thus, plaintiffs' position would require this Court to ignore the clear holding of *Library of Congress*. Section 1988 contains the identical phrases analyzed in *Library of Congress*. The legislative history of § 1988 notes its reliance on the "language of Title[] . . . VII of the Civil Rights Act of 1964." S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910. The identical language in both statutes is "a reasonable attorney's fee as part of the costs."

Plaintiffs' position requires this Court to apply inconsistent meanings to identical statutory terms. To illustrate, plaintiffs ask this Court to find that the term "reasonable attorney's fee" includes an element of prejudgement interest or compensation for delay in a fee award under § 1988 when *Library of Congress* specifically held that the fee-shifting provision of Title VII did not include such an element. Plaintiffs further ask the court to find that the term "costs" includes an element of prejudgement interest or compensation for delay when fees are awarded under § 1988 even though *Library of Congress* rejected the argument that "costs" under Title VII includes an element of prejudgement interest or compensation for delay. Neither law nor logic support plaintiffs' position.

In an attempt to avoid the logical application of *Library of Congress*, plaintiffs set forth numerous policy

reasons why compensation for delay should be allowed. Plaintiffs argue that "first-quality lawyers" cannot be attracted to civil rights cases "without compensation for delay." Resp. Br. 22. Plaintiffs contend that fee awards under § 1988 must be similar to what is traditional with attorneys compensated by a fee-paying client, *id.* at 23, and that "substantial hardship" would result from delayed compensation. *Id.* at 21-26.

Initially, it must be noted that the hardship caused by delay in payment has been greatly exaggerated by plaintiffs throughout this fee litigation. The fee award in this case involved attorneys who worked on the case from 1979 through June 30, 1986. Arthur Benson and his staff entered their appearance in 1979 and the NAACP Legal Defense Fund (LDF) entered their appearance in 1982 (J.A. 2). The plaintiffs became prevailing parties in this litigation on September 17, 1984, when the district court entered its order finding the State defendants and the Kansas City, Missouri School District (KCMSD) liable (Pet. App. A171-A215). The first fee application, however, was not filed until almost seventeen months later in February, 1986 (J.A. 12). Thus, interim fees were not requested at the point where plaintiffs became prevailing parties.

Plaintiffs' claim of financial hardship on the attorneys[4] involved loses its force in light of the delay in filing fee applications. Further, plaintiffs' argument does

4. In *Evans v. Jeff D.*, 475 U.S. 717, 730 n.19, 731-32 (1986) this Court made clear that "Congress bestowed on the 'prevailing *party*' (generally plaintiffs) a statutory eligibility" for § 1988 attorney's fees and, correspondingly, that Congress did not intend to vest the right to statutory fees in the prevailing party's attorney. In the case at bar, there is nothing in the record to suggest that the party plaintiffs suffered any hardship as a result of delay in payment.

not withstand scrutiny when considering the time period when most of the services were incurred. The district court ordered reimbursement for approximately 18,083 hours of attorney time (Pet. App. A42-A43). This does not include fees incurred in litigating the fee applications. Extrapolating from the fee applications, the hours compensated per year break down as follows:

Year	Hours Compensated
1979	163
1980	60
1981	126
1982	889
1983	9,173
1984	6,510
1985	1,129
1986 (June 30)	33
TOTAL	18,083

Approximately 86.7% of the hours compensated were incurred in 1983 and 1984, within two years of the date plaintiffs became prevailing parties.[5] Viewed in this light, plaintiffs have clearly exaggerated any hardship caused by delay in payment.

In any event, the policy arguments presented by plaintiffs apply in equal force to Title VII cases and were considered and rejected in *Library of Congress*. There, the lower court had indicated that increasing an attorney's

5. These numbers and the numbers in the table are approximations and extrapolated from the fee applications. The fee applications and responses thereto are part of the record and identified in the Joint Appendix as docket numbers 1154, 1156, 1191, 1199, 1200, 1201, 1223, 1283 (J.A. 12-16).

fee award for delay is appropriate because the hourly rate used for the lodestar represents the prevailing rate for clients who typically pay their legal bills promptly and court-awarded fees are normally received long after legal services are rendered. 478 U.S. at 313. The lower court concluded that an increase for delay is designed to compensate the attorney for the money he could have earned had he been paid earlier and invested the funds. *Id.* *Library of Congress* acknowledged that policy reasons can be compelling, but found that policy is insufficient to waive a sovereign's immunity. *Id.* at 320-21.

Plaintiffs' argument is that the policy reasons behind Congress' enactment of § 1988 necessarily requires that the statute be interpreted to include prejudgement interest or compensation for delay. Compare plaintiffs' position to the argument rejected in *Library of Congress*:

> Respondent argues, however, that the policy reasons that motivated Congress to permit recovery of a *reasonable* attorney's fee require reading the statute as a waiver of immunity from interest.

478 U.S. at 320-21 (emphasis in original). The policy reasons advanced by plaintiffs are not sufficient to overcome the State's immunity and should be addressed to Congress.

Plaintiffs also claim that the legislative history of § 1988 supports their position. Plaintiffs note that the Senate Report cited *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), a desegregation case in which this Court upheld an interim fee award. Cited in Senate Report at 5. Plaintiffs also note that the Senate Report stated that in "appropriate circumstances, counsel fees under [§ 1988] may be awarded pendente lite." Resp. Br. at 25, citing Senate Report at 5.

Plaintiffs' analysis, however, was specifically considered and rejected in *Rogers v. Okin*, 821 F.2d 22 (1st Cir. 1987). The First Circuit indicated that the mention of interim fees in the legislative history of § 1988 actually supports the position that prejudgement interest or compensation for delay is not available under the statute. The First Circuit concluded:

> The specific mention of the possibility of interim fee awards to cushion the burden on plaintiffs seem to us to cut against any implication that the alternative approach of prejudgement interest was contemplated.

821 F.2d at 27.

Plaintiffs also argue that Eleventh Amendment immunity depends on a "retroactive-prospective distinction" and that an award of costs is a portion of the expenses incurred in seeking prospective relief. Resp. Br. at 8, citing *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978). Again, plaintiffs' argument depends on a finding that prejudgement interest or compensation for delay is an element of "costs." Notwithstanding this problem, plaintiffs' "retroactive-prospective distinction" does not survive scrutiny.

Plaintiffs' claim is that litigation costs are not part of the "retroactive liability for prelitigation conduct" prohibited by the Eleventh Amendment. Resp. Br. 6. As noted above, however, *Library of Congress* specifically held that prejudgement interest or compensation for delay is not "costs", but rather an element of "damages."

Damages, however, are compensatory and are clearly barred by the Eleventh Amendment. See, e.g., *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945); *Cory v. White*, 457 U.S. 85, 90 (1982). Pre-

judgement interest or compensation for delay is not part of prospective relief. Prospective relief refers to relief granted from the date of the judgement. Thus, for example, the Eleventh Amendment would bar retroactive payment of welfare benefits found to have been wrongfully withheld, but would not bar a judgement requiring prospective compliance. *Edelman v. Jordan*, 415 U.S. 651 (1974).[6]

What plaintiffs seek to recover herein, however, is interest or compensation for delay for the time period before the judgement. In effect, plaintiffs seek compensatory relief for interest or "damages." As *Library of Congress* cautions, a party may not avoid sovereign immunity and seek interest or damages for delay simply by attaching another label to the term. 478 U.S. at 321-22 ("no-interest rule cannot be avoided simply by devising a new name for an old institution").[7]

In their brief, plaintiffs attempt to find support for their position in a state statute that authorizes awards of prejudgement interest in state court. Resp. Br. 17. The State's "constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst II*, 465 U.S. at 99. The question of waiver is a matter of federal law and the court has

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6. To carry plaintiffs' argument to its logical conclusion, the plaintiffs in *Edelman* should have been able to collect interest on the welfare benefits wrongfully withheld even though the Eleventh Amendment barred recovery of the welfare payments.

7. Plaintiffs' citation to *Platoro Limited, Inc. v Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), is not persuasive. There, the court found a waiver of Eleventh Amendment immunity. *Id.* at 901. The court noted, however, that prejudgement interest is "compensatory." *Id.* at 906 n.20. Unlike *Platoro*, in cases where the state has not waived its Eleventh Amendment immunity, "compensatory" liability is barred.

established a "stringent" test for finding that a state has waived its immunity from federal court jurisdiction. *Atascadero*, 473 U.S. at 241. There is nothing in the record to suggest that the State has unequivocally waived its federal court immunity on this issue.

The arguments presented in plaintiffs' brief are inconsistent with a long line of Eleventh Amendment decisions by this Court. The doctrine of sovereign immunity, as embodied in the Eleventh Amendment, is an important part of our federal system and reflects the Framers' careful allocation of responsibility among the state and federal judiciaries. Plaintiffs' position would undermine the logic of the constitutional scheme and repudiate almost a hundred years of Eleventh Amendment jurisprudence.

II

SECTION 1988 DOES NOT AUTHORIZE THE AWARD OF FEES FOR PARALEGALS AT MARKET RATES.

Plaintiffs and *amicus curiae* raise essentially the same arguments. They seek a market-based rule for paralegal services that, at least in this case, is five, six or even seven times the actual cost. Without any statutory authority, plaintiffs and *amicus* equate paralegal services with attorney services. In this particular case, however, the paralegals were an expense, employed specifically for this case. Under such circumstances, there is no legal basis for plaintiffs' position that Congress implicitly approved a profit-producing market approach to this type of expense.

A. There Is No Statutory Authorization for Such an Award.

There is simply no statutory authorization for the award of paralegal fees at market rates. The statute is

silent on that subject, as it is silent on the question of secretary fees or messenger fees. Plaintiffs by and large do not dispute that the statute does not contain any explicit authorization for the award of paralegal fees at market rates. There is no mention of the landmark case of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), or any discussion of the normal rules of statutory interpretation in the section of their brief which concerns the paralegal issue.

It should be clear that the State is not suggesting that the paralegal expenses in this case should not be separately compensated. A reasonable argument could be made that Congress did not consider this issue and such services are part of office overhead. In the narrow context of this case, however, the State seeks only to limit reimbursement to the actual cost of paralegal services.

Plaintiffs do not dispute that the statute is silent on this issue. Plaintiffs point to an oblique reference in the legislative history to a single case—*Davis v. County of Los Angeles*, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048 (C.D. Cal. June 5, 1974). There, a $10 hourly rate was awarded to a law clerk and a paralegal assistant. Plaintiffs concede that there is no indication that the $10 rate was based on market rates. Resp. Br. 30.

On the basis of a passing reference to *Davis*, plaintiffs justify recovery from the taxpayers of almost $400,000 in profit on their paralegal expenses.[8] *Davis*, however, is cited by Congress only for its correct application of the

8. The district court's May 11, 1987, fee order awarded almost $650,000 to plaintiffs' attorneys for paralegal services (Pet. App. A42-A43). If the hourly rate was limited to $15, as suggested by the State, the paralegal award would have been approximately $250,000.

factors in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)—factors that concern calculation of the *attorney's* fee.

Clearly, Congress never specifically considered this issue. Section 1988 was enacted in 1976 as a reaction to this Court's opinion in *Alyeska*. See *City of Riverside v. Rivera*, 477 U.S. 561, 567 (1986). At that time, lawyers rarely, if ever, billed separately for paralegal services.

The *amicus* brief actually supports the State's argument by noting that separate billing for paralegal services is a post-§ 1988 occurrence.

> In the not so distant past the court would have frowned upon the practice of billing paraprofessional time separate from attorney time just as it might if a firm separately recorded and billed the hours spent by a secretary on a specific client . . . .

Amicus Br. 7, citing *In re Chicken Antitrust Litigation*, 560 F.Supp. 963, 977-78 (N.D. Ga. 1980). See also *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir. 1983) (separate billing is an "increasingly widespread custom").

Had Congress actually considered the issue, it is by no means clear how they would have reconciled the competing policy interests. While Congress intended to encourage lawyers to handle civil rights cases, Congress specifically warned that "fees [should] not produce windfalls to attorneys." See S.Rep. No. 94-1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News, 5908, 5913.

The result urged by plaintiffs is contrary to this concern by Congress. If paralegal expense is reimbursed at a rate many times the actual cost, will attorneys next try

to bill separately—and at a profit—for such items as secretarial time, paper clips, electricity, and other expenses?

This is not a theoretical example. In this very case, plaintiffs' attorneys received separate reimbursement—albeit probably not on a profit basis—for such items as office rent, electricity, car repair, typewriter rental, file cabinets, file storage, local counsel travel expenses, local parking, office supplies, telephone equipment, office furniture, computer rental, office stationery, house rent, rented furniture for house, gas and electricity for rental house, and maid service for rental house.[9] These items are generally thought to be part of office overhead included in the normal hourly rate.

What is happening is that fee-seeking attorneys are separating every single item possible for separate reimbursement and then expecting their normal hourly rate. The State submits that Congress would not validate such a practice. While plaintiffs and *amicus* set forth numerous policy reasons for their position, such arguments should be addressed to the legislative body.

B. Plaintiffs' Policy Arguments Fail Under the Facts of This Case.

Plaintiffs and *amicus* argue that reimbursing the actual cost of paralegal services would undermine the purpose of § 1988, increase the cost of litigation, and encourage lawyers to do paralegal work. Regardless of the validity of those arguments in general, these policy reasons have no bearing on the particular facts of this

9. See expenses detailed in plaintiffs' fee applications: Motion for Partial Award of Attorneys' Fees and Expenses, Attachment C, filed February 5, 1986 (Docket No. 1154 (J.A. 12)) (Benson Application); Motion for Partial Interim Award of Attorneys' Fees and Expenses, Appendices D, D-1, E, filed February 11, 1986 (Docket No. 1156 (J.A. 12)) (LDF Application).

case. The attorneys for plaintiffs fail to explain how the plaintiffs in this case are benefitted by their attorneys receiving $400,000 in profit on expenses incurred specifically in this litigation. Admittedly, the more money lawyers make in civil rights cases, the more civil rights cases that will be litigated. Plaintiffs' arguments, however, would justify separate billing for secretarial time, messenger service, electricity, telephone, paper clips—separate billing at a rate four or five times the actual cost of the expense.

Plaintiffs also take a very cynical view of attorneys by claiming attorneys will start doing paralegal work. There is nothing in the record, however, to suggest that result. In this case, plaintiffs' attorneys entered this case at a time when separate billing for paralegal services was not a widespread practice. Plaintiffs do not suggest that their attorneys would never have taken this case had they known they could not make a $400,000 profit on paralegals hired specifically for this case.

More importantly, as the *amicus* adequately explain, courts now have the discretion and would continue to exercise that discretion to ensure that attorneys are not performing services that could otherwise be performed by a non-attorney. See *Amicus* Br. pp. 18-20. This is sufficient to deter attorneys from receiving attorney rates for paralegal services.

Plaintiffs also dispute the State's argument that reimbursement of actual cost would avoid unnecessary litigation. Resp. Br. 34. This case, however, is a perfect example of the State's position. This Court has cautioned that fee litigation should not result in a second major lawsuit. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Rather than engage in a minute examination of the por-

tion of office overhead and benefits attributable to paralegal employees, the State was willing to just assume a percentage that clearly covered any such overhead. Thus, the State suggested that reimbursement at $15 per hour would more than cover the actual expense of paralegal employees. Plaintiffs do not dispute this. This is more than twice the hourly wage paid to most of the paralegals. Pet. Br. 6.

The State does not dispute that reasonable policy arguments could be made on both sides of this issue. This Court, however, need not decide an ironclad rule that applies to all civil rights cases or fee-shifting statutes. Under the particular facts of this case, the cost-based approach suggested by the State is reasonable and fully consistent with § 1988.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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